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IN THE
COURT OF APPEALS OF INDIANA

NICHOLAS E. BUSKIRK,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 30A05-0609-JV-491
	)	
HANCOCK COUNTY DEPARTMENT OF CHILD SERVICES,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Larry J. Amick, Judge Pro Tempore
Cause No. 30D01-0601-JT-12

March 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Nicholas E. Buskirk ("Father") appeals the trial court's termination of his parental rights with respect to P.B., a minor child. Father raises a single issue for our review, which we restate as:

1. Whether the Hancock County Department of Child Services ("DCS") adequately provided services to assist in attempting to reunite Father with P.B.

2. Whether the DCS presented sufficient evidence to support the termination of Father's parental rights.

We affirm.

FACTS AND PROCEDURAL HISTORY

P.B. was born prematurely on May 14, 2004, in Indianapolis, and she was placed in the Neo-Natal Intensive Care Unit at St. Vincent's Hospital. Until about two weeks before P.B.'s birth, Father and Heather Clever ("Mother") had been residing in California, where they had fled "due to [g]ang related death threats against them [and their] infant." Pet. Exh. 2 at 5. While at the hospital, the parents "were verbally abusive and physically abusive to each other." Id. at 2. That conduct prompted a report to the DCS, and a caseworker then interviewed Mother and Father. In that interview, Father admitted to being a member of the Crips gang and displayed gang-related tattoos on his arm. Father also informed the DCS that, while in California, he had been arrested for battery and stalking after he got "angry with someone so he followed them [sic] home and beat them [sic]." Id. at 6. Father also stated that "he may not be [able] to pass a drug screen." Id. at 7.

On July 16, 2004, the DCS took custody of P.B. upon her release from the hospital. At that time, Mother and Father had "no food, clothes, crib or diapers," and there were "mental health concerns" for each of the parents, specifically Father's bipolar disorder. Id. at 2. In addition, the parents' Indiana home did not have a functioning toilet or faucet. However, on August 3, the trial court ordered P.B. returned to her parents. At the same time, the court ordered the parents to submit to psychological evaluations, to cooperate with home-based counseling, to complete parenting classes, to submit to substance abuse evaluations and drug screens, to allow the DCS staff to enter their home to assess conditions, and to comply with P.B.'s medical appointments and medical recommendations.

On August 18, Mother and Father were "kicked out of" the camper at the Mohawk Camp Grounds in Hancock County, where they had been residing with P.B. Pet. Exh. 12 at 1. The family had been removed due to a physical altercation between Father and a neighbor, during which Mother received an injury to her face. The family moved to a hotel in Greenfield and notified the DCS that they were in need of assistance. The DCS referred the parents to the Hancock County Hope House for assistance with housing, but the parents refused to cooperate and subsequently refused to provide the DCS with their location. On August 23, the DCS filed a report with the court alleging an inability to provide services due to the parents' noncompliance with the court's order.

On August 29, the family's court appointed special advocate ("CASA") contacted the DCS and informed the family case manager that the family had been staying in Ohio. The CASA also stated that Ohio law enforcement was looking for the family and that

P.B. "may have a black eye." Pet. Exh. 13 at 1. The family case manager then contacted Dawn Gray, with whom the family had reportedly stayed while in Ohio. Gray stated that "she was disturbed by [Father's] behavior" and that Father "punched his truck causing a laceration on his hand, and threaten[ed] to stand on the front porch and scream until [Mother] brought the baby out [to him.]" Id. Gray also stated that P.B. had bruising around her eye and that "the only explanation the parents could give for the bruising was that [P.B.] may have rolled over onto her pacifier." Id. The family case manager stated that "[t]his is concerning as it is highly unlikely that [P.B.] can roll over at this stage of her development." Id.

On August 31, the DCS filed a report to the court. The DCS also requested custody of P.B., alleging that "detention is necessary to protect the child." Pet. Exh. 14 at 1. The trial court granted the DCS's petition and the DCS took custody of P.B. The family case manager then confirmed that P.B. "had bruising on her right eyelid and it appeared to be a little bit swollen. There was also a small bruise on her right cheek . . . maybe an inch or so under her eye." Appellant's App. at 114. Subsequent to the court's order, Father was extradited to California to serve a sixty-day sentence on an outstanding warrant.

While in the DCS's care, medical professionals examined P.B., especially for head trauma. Following those examinations, the DCS "was informed by both Riley[] Children Hospital and St. Vincent's [H]ospital that test results indicated that [P.B.] had a probable skull fracture. [The DCS] was also advised that the bruising around the eye was likely [a] result of trauma and not likely to occur with routine care." Pet. Exh. 19 at

3. Thereafter, Mother voluntarily terminated her parental rights. Due to the conditions of his parole from incarceration in California, Father did not appear at any of the trial court's hearings in Indiana.

On September 1, the court held an initial hearing on the DCS's petition alleging P.B. to be a child in need of services ("CHINS"). On October 12, the court held a fact-finding hearing and declared P.B. to be a CHINS. The court also ordered P.B. to be placed in foster care. Pursuant to the CHINS determination, periodic permanency review hearings were held on March 10, May 2, September 23, and December 22 of 2005, and on February 27 and April 11 of 2006. As a result of those hearings, the court entered orders variously requiring Father to pay child support to the DCS, to cooperate with any and all service providers that contact him, and to maintain appropriate contact with the DCS, keeping the DCS informed of his current address and phone number. In addition, at the February 27, 2006, hearing, the DCS stated in its summary to the court that:

> [Father] has not been offered services since July 2004 due to his incarceration in California on at least two occasions. He was released after being charged with domestic battery and a crime against a child. This office has attempted to contact his parole officer for details with no success.
>
> * * *
>
> Additionally, . . . [Father] has been in recent communication, albeit inconsistent, with [the family case manager]. He is scheduled to travel to Indiana and meet with [the family case manager] later in the week. He has not provided any documentation that he has complied with his court-ordered obligations and has not visited with [P.B.] since his extradition to California in September [of] 2004. He also has requested on multiple

> occasions (to previous DCS Director[] Ruth Alewine and in a letter to the court last year) that he would like to relinquish his parental rights.[1]

Pet. Exh. 29 at 5-6, 8.

On July 26, 2006, the court ordered an involuntary termination of Father's parental rights. Father appeared by counsel, but did not appear in person despite having received written and oral notice. In its order, the court stated that "[t]here is a reasonable probability that the conditions that resulted in [P.B.'s] removal from the home . . . of [Mother] and [Father] will not be remedied and that the continuation of the parent/child relationship poses a threat to the well-being of the child." Appellant's App. at 64. The court also found termination of Father's rights to be in P.B.'s best interests, and that the DCS had a satisfactory plan for the care and treatment of P.B. This appeal ensued.

DISCUSSION AND DECISION

Father contends that the DCS failed to provide adequate efforts to reunite Father with P.B. Father also maintains that the evidence is insufficient to support the involuntary termination of his parental rights under Indiana Code Section 31-35-2-4(b)(2). We address each argument in turn.

Standard of Review

Initially, we note that the purpose of terminating parental rights is not to punish parents, but to protect the children. Weldishofer v. Dearborn County Div. of Family & Children (In re J.W.), 779 N.E.2d 954, 959 (Ind. Ct. App. 2002), trans. denied.

[1] This appears to have been a shift in Father's position, as a caseworker in an earlier report had commented that "[Father] has repeatedly contacted the [DCS] with regard to [P.B.] He continues to live in California and has reported that he cannot leave the state at this time due to parole issues. [Father] has stated that he would like to have full custody of [P.B.]" Appellant's App. at 40.

> Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents. This includes situations not only where the child is in immediate danger of losing his life, but also where the child's emotional and physical development are threatened.

Id.

In reviewing a decision to terminate a parent-child relationship, this court will not set aside the judgment unless it is clearly erroneous. Everhart v. Scott County Office of Family & Children, 779 N.E.2d 1225, 1232 (Ind. Ct. App. 2002), trans. denied. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences to support them. Id. When reviewing the sufficiency of the evidence, this court neither reweighs the evidence nor judges the credibility of the witnesses. Id.

To support a petition to terminate parental rights, the DCS must show, among other things, that there is a reasonable probability that:

> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
>
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child.

Ind. Code § 31-35-2-4(b)(2)(B). The DCS also must show that termination is in the best interests of the child and that there exists a satisfactory plan for the care and treatment of the child. Ind. Code § 31-35-2-4(b)(2)(C), (D). These factors must be established by clear and convincing evidence. Ind. Code § 31-34-12-2.

Regarding subsection (B) of the statute, we note that the DCS need only present clear and convincing evidence that either the conditions resulting in removal will not be remedied or that the continuation of the parent-child relationship poses a threat to the

child's well-being. Hence, if we hold that the evidence is sufficient to support the trial court's conclusion that the conditions resulting in the child's removal will not be remedied, we need not address whether continuation of the parent-child relationship poses a threat to the well-being of the child.

In interpreting Indiana Code Section 31-35-2-4, this court has held that the trial court should judge a parent's fitness to care for his or her child as of the time of the termination hearing, taking into consideration evidence of changed conditions. J.K.C. v. Fountain County Dep't of Pub. Welfare, 470 N.E.2d 88, 92 (Ind. Ct. App. 1984). However, recognizing the permanent effect of termination, the trial court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. Id. To be sure, the trial court need not wait until the child is irreversibly influenced by a deficient lifestyle such that the child's physical, mental, and social growth is permanently impaired before terminating the parent-child relationship. Id. at 93.

A pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, will support a finding that there exists no reasonable probability that the conditions will change. Matter of D.B., 561 N.E.2d 844, 848 (Ind. Ct. App. 1990). Where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances, the problematic situation will not improve. Matter of D.L.W., 485 N.E.2d 139, 143 (Ind. Ct. App. 1985). When the evidence shows that the child's emotional and physical development is threatened, termination of the

parent-child relationship is appropriate. Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992).

Issue One: Services Provided

Father first contends that the DCS failed to provide adequate services to him in each of the four case plans the DCS prepared in an attempt to reunify the parents with P.B. We cannot agree. First, Father argues that each of the four plans placed substantially more burden on Mother than on Father, and that, therefore, Father's parental rights were improperly terminated. To the extent that Father's argument here is that Mother's failure to comply with her orders was, in effect, improperly attributed to Father that reasoning fails as Father also did not comply with the court's orders. See Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 149 (Ind. 2005) (holding that the trial court improperly terminated a father's parental rights when he was in full compliance with the court-ordered case plan for reunification).

Second, Father maintains that his rights were improperly terminated because the DCS did not attempt to provide him services in California or to examine the conditions of his California life. However, Father's argument on this issue ignores the fact that Father failed to maintain appropriate contact with the DCS or to provide the DCS with direct contact information while in California. Indeed, as a caseworker testified:

> Q [by Father's counsel]: [D]id the Court order a home study be done in California for [Father]? . . .
>
> A [by caseworker Emily Moore]: I don't—
>
> Q Was that ever ordered?
>
> A I don't believe it was ordered . . .

* * *

Q Have you been in contact with the Child Services people in California to try to offer him the same services, I mean—The person, and for whatever reason, the person can't leave California, he can't leave California because he's on probation out there, correct? I mean is that—

A Correct.

Q Correct.

A On parole, yes.

Q On parole, I'm sorry. But the services provided are mostly back here?

A He is—it's my understanding that he had been ordered to complete services as a condition of his parole which include anger management, and—we don't have—

* * *

Q Would it have been possible through California Child Services to do a home study out there assuming you could have found him?

A If he could have complied with giving his address of residence.

Q Was that recommended to him?

A It's part of the Court order to provide us with that information.

Transcript at 582-83. In other words, the Father's failure to maintain appropriate contact with the DCS prevented the DCS from requesting California's Child Services to provide him with services. As such, Father's arguments that the DCS failed to provide proper services is without merit.

Father also complains that his parental rights were improperly terminated as he was financially unable to attend the termination hearing. But due process only requires

that the State, at a minimum, provide appropriate notice of the action and afford the interested parties an opportunity to respond and present objections. See Castro v. State Office of Family & Children, 842 N.E.2d 367, 375 (Ind. Ct. App. 2006), trans. denied. Here, Father had notice of the hearing and ample opportunity to attend it. Indeed, the court orally informed Father of the termination proceeding on March 1, 2006, and the court held the hearing, after five continuances were granted,[2] about four and one-half months later, on July 19, 2006. Hence, Father, who was represented by counsel, had sufficient notice and opportunity to prepare a statement in the event he could not personally attend the hearing.[3]

Issue Two: Sufficiency of the Evidence

Father next challenges the sufficiency of the evidence supporting the involuntary termination of his parental rights. Specifically, Father argues that the evidence does not demonstrate either that the conditions that resulted in P.B.'s removal will not be remedied or that the continuation of the parent-child relationship poses a threat to P.B.'s well-being. If we hold that the trial court's finding on either of those positions is not clearly erroneous, we need not address the other position. We hold that the trial court's finding that the conditions that resulted in P.B.'s removal will not be remedied is not clearly erroneous.

Again, a pattern of unwillingness to deal with parenting problems and to cooperate with those providing social services, in conjunction with unchanged conditions, will

[2] Father filed one motion for continuance on July 19, 2006, which the court denied.

[3] Father asserts that he was "within two weeks of having enough money to defend himself in court." Appellant's Brief at 15. However, Father fails to verify that assertion with any supporting facts. Therefore, the assertion is waived. See Ind. Appellate Rule 46(A)(8)(a).

support a finding that there exists no reasonable probability that the conditions will change. D.B., 561 N.E.2d at 848. Further, where there are only temporary improvements and the pattern of conduct shows no overall progress, the court might reasonably find that under the circumstances, the problematic situation will not improve. D.L.W., 485 N.E.2d at 143. And the trial court must evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. J.K.C., 470 N.E.2d at 92.

Father spends a substantial amount of his brief challenging the weight and credibility of the evidence. Specifically, Father maintains: (1) that he was forthright about his bipolar disorder; (2) that he could not afford proper medication for that disorder; (3) that the "instances of violence . . . were actually centered around [Mother] or the boyfriend of the [maternal] grandmother," Appellant's Brief at 9; (4) that P.B.'s orbital injury was the result of rolling over onto her pacifier; (5) that he was forthright about his criminal record; (6) that he did maintain contact with the DCS; (7) that he could not visit Indiana due to conditions of his California probation; and (8) that the attending St. Vincent's doctor testified that both parents displayed "very loving behavior" towards P.B., id. at 12.[4] But we will not reweigh the evidence or reassess the credibility of witnesses on appeal. See Everhart, 779 N.E.2d at 1232.

[4] We note that the full context of this quote paints a different picture than that provided by Father's brief:

> Q [by attorney Nicole Zelin, on behalf of the DCS]: Do you think the parents could benefit, and [P.B.] could benefit, from having counseling in anger management training?
> A [by Dr. Robert Jansen]: I really do think they could.
> Q Is it your testimony here today that [M]other and [F]ather do not love their child?
> A Not at all.

Contrary to Father's assertions, the facts demonstrate his pattern of unwillingness to deal with parenting problems or to cooperate with those providing social services, as well as the unchanged conditions of Father's life and patterns of conduct. On July 16, 2004, the DCS took custody of P.B. for the first time. In support of taking custody, the DCS informed the court of incidents of domestic violence between Father and Mother; Father's criminal history and gang-related activity; Father's admitted nontreatment of his bipolar disorder; and the parents' lack of necessary food, clothes, crib, diapers, and properly functioning facilities. However, on August 3, 2004, the trial court allowed the parents to retake custody of P.B. so long as the parents each complied with a set of conditions.

Father repeatedly failed to comply with the conditions established by the trial court and continued to engage in destructive transgressions. Father and Mother continued having physical altercations, such as the altercation with a neighbor that resulted in Mother receiving a black eye. And Father also had physical and verbal outbursts, such as the incident in Ohio in which Father lacerated his hand punching a vehicle. Further, Father, along with Mother, continuously moved, and spent time out of state, while failing to inform the DCS of his location. When the DCS did locate the family, P.B. had bruising around her eye. Subsequent medical tests indicated that P.B.

Q Okay.
A In fact I saw them display very loving behavior with [P.B.]
Q Okay. So you believe they love their child, they care for their child. Do you believe at this time, from what you've observed and from what you've reviewed with the nursing notes and gone over with staff, that they have the ability to safely care for the child without further training in their own home on their own?
A I'm concerned that these other issues that we've talked about really could get in the way of them providing safe care.

Transcript at 45-46.

likely had a skull fracture due to the physical trauma that caused the bruising, whatever that physical trauma may have been. In light of those facts, the DCS petitioned the court once again for custody of P.B., stating that "detention is necessary to protect the child." Pet. Exh. 14 at 1.

At about that same time, Father was extradited to California on a parole violation and incarcerated. Father was released from jail in January of 2006, although either his incarceration or financial means after release prevented him from attending the subsequent hearings in Indiana. Father was able to contact the family case manager, but that contact was sporadic. The family case manager testified that "[w]hen he does call it is very hostile and [he] has used expletives on the phone . . . and has hung up." Transcript at 576-77. Father also made phone calls to Mother when Mother would visit P.B. Regarding those phone calls, another caseworker testified:

> I had observed . . . [Mother] talking with [Father] on the phone. I talked with her about that and talked with her that if, you know, one visit per week for about five minutes if—she said [Father] wanted to talk to [P.B.], if she wanted to, you know, call him and hold the phone up to [P.B.'s] ear so she could hear her father's voice that was fine and appropriate. But what I observed after that was for long periods of time during the visit, and I don't know the exact amount, but I would say fifteen to twenty minutes is my estimate[,] [Mother] would be on the phone with [Father]. My perception of what I heard was that it was loud and it sounded—her voice sounded angry to me. At one point I asked her to hang up the phone and she did not immediately hang up the phone. . . . I observed . . . that [Mother] . . . was yelling on the phone at [Father] . . . .

Transcript at 274-75. In addition, the only contact information Father provided the DCS while he was in California was his mother's phone number. Father did not provide an address for his place of residence or a direct phone number.

On appeal, Father challenges the evidence by asserting that the DCS and trial court did not properly evaluate his personal and mental fitness to be a parent. In essence, Father maintains that the court primarily focused on Mother's unfit conduct and applied those negative findings toward him, contrary to Bester. But Bester is inapposite. In Bester, our supreme court reversed a trial court's order involuntarily terminating the parental rights of a father. The father in Bester argued that the trial court focused on the mother's unfit conduct and erroneously applied those findings toward him. Our supreme court agreed, stating:

> [t]he record shows that Father was in full compliance with the court ordered case plan for reunification which required him to (1) submit to psychological evaluations and follow through with any recommended treatment, (2) submit to random drug screens, (3) successfully complete parenting classes, and (4) visit with the child regularly.

Id. at 149 (emphasis added). That is, because the trial court's order was unsupported in the record, our supreme court reversed the order and reinstated the father's parental rights.

Here, unlike in Bester, the trial court's order is fully supported by the record. Unlike the father in Bester, Father here has continuously and repeated failed to comply with the trial court's orders to maintain contact with the DCS and to keep the DCS informed of his location. And although the trial court was unable to personally observe Father's fitness to care for his child at of the time of the termination hearing, there was sufficient evidence before the court for it to evaluate Father's habitual patterns of conduct to determine whether there was a substantial probability of future neglect or deprivation of the child. See J.K.C., 470 N.E.2d at 92. Father's habitual patterns include criminal

activity, violent and abusive conduct, and ignoring court orders and DCS recommendations. Father presented no evidence to the trial court that his involvement in gang activity had ceased, that he no longer used illegal drugs, that his criminal activity was behind him, that his living situation had stabilized, or that he was able to provide P.B. basic necessities. On these facts, we cannot say that the trial court's finding that the conditions that resulted in P.B.'s removal will not be remedied is clearly erroneous.

Affirmed.

MAY, J., and MATHIAS, J., concur.